Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of:

Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act Of 1992	MB Docket No. 05-311

To: The Commission

REPY COMMENTS
Of
BUCKS COUNTY CONSORTIUM OF COMMUNITIES

AND NOW COMES The Bucks County (Pennsylvania) Consortium of Communities by and through its counsel, Frederick A. Polner, Esquire, and files this its REPLY COMMENTS in the above captioned matter. In support whereof it is averred as follows:

The Bucks County Consortium of Communities is a consortium comprised of over 30 municipalities located in Bucks County, Pennsylvania. The members of the consortium are the following: Chalfont Borough, Doylestown Borough, Dublin Borough, Lower Makefield Township, Middletown Township, New Britain Borough, New Britain Township, Newtown Borough, Newtown Township, Northampton Township, Penndel Borough, Perkasie Borough, Silverdale Borough, Upper Southampton Township, Warminster Township, Warrington Township, Warwick Township, Wrightstown Township, Bensalem Township, Doylestown Township, Ivyland Borough,

Langhorne Borough, Langhorne Manor Borough, Upper Makefield Township, Yardley Borough, East Rockhill Township, Lower Southampton, New Hope Borough, Solebury Township, West Rockhill Township, Bedminster Township, Milford Township, Sellersville Borough and Tullytown Borough. and Plumstead Township. Each one of the listed communities is a local government and is vitally interested in the captioned matter.

Comments filed in the captioned matter argue that local franchising should be preempted, modified or eliminated. It is alleged by those filing Comments, specifically including Verizon, that doing so is good public policy and that the FCC has the legal authority to do so. To the contrary, as the Consortium demonstrates in these Reply Comments, the preemption, modification or elimination of local franchising by the FCC would be toxic public policy and would be contrary to law.

Local communities in Pennsylvania must be looked at apart from local communities in other states. In Pennsylvania, there is a long and rich tradition of local communities managing their public rights of way. The management of rights of their way includes not only the *physical* management of the rights of way, but includes, as well, the *fiscal* management of those rights of way.

At the time the United States was created, the lands of colonial Pennsylvania were vested in the Commonwealth of Pennsylvania "for the use and benefit of all citizens thereof." 64 P.S. § 1. However, local control of public rights of way was retained. "Every municipal corporation shall have the power to open, widen, straighten, or extend streets or alleys, or parts thereof, within its limits..." 53 P.S. § 1672.

Since before the Constitution of the United States, land use and the regulation of streets has always been a matter of local law in Pennsylvania. When William Penn granted land to early colonists, provisions were made for roads. A statute in 1699 gave the Governor and Council the authority to lay out public roads, and the county courts were directed to provide access roads or cartways. The Governor appointed men to pave, clear or repair streets, which work was to be paid for by a charge assessed on adjoining landowners. Then, in 1700, the newly formed counties in Colonial Pennsylvania were directed to establish townships, the supervisors of which were appointed to build and maintain the roads. 1 Gail McKnight Beckman, The Statutes at Large of Pennsylvania in the Time of William Penn 43 (1976).

Therefore, it is no surprise that the Pennsylvania Supreme Court has held that "the streets and alleys of cities, towns and boroughs are under the control and direction of ... municipalities, and they have all the power over them that can lawfully exist." Wood v. McGrath, 150 Pa. 451, 456, 24 A. 682, 683 (1892).

Under Pennsylvania law, local governments have the right to charge private parties rent for the use of their respective streets and rights-of-way. This right is a matter of state law and exists independently of any federal right.

State law has been recognized as an independent basis for a local government to manage and control its rights of way. This is made clear from City of Dallas v. FCC, 165 F. 3d 341 (5th Cir. 1999). There, it was observed:

> The FCC's preemption of local franchising requirements is at odds with the Act's preservation of state and local authority and with a "clear statement" principle the Supreme Court has articulated. Section 601(c) (1)

> of the Act, ... directs that "the amendments . . . shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Acts or amendments." 1996 Act, § 601(c) (1).

The Pennsylvania case of Philadelphia v. Holmes Elec. Protective Co., 335 Pa. 273, 6 A. 2d 884 (1939) is particularly instructive. There, the city passed an ordinance giving the defendant corporation permission to place wires under its streets in the course of the corporation's business. The ordinance also provided that the corporation would pay the city two percent of its annual gross receipts. The city later sued the corporation for sums due under the ordinance, and the Pennsylvania Supreme Court held:

> As a consideration for permitting it to operate underground wires in the streets the City could exact whatever payments in the nature of rentals it might deem proper...But the consideration exacted in the ordinance is neither a tax nor a license fee; it is in the nature of an annual rental to be paid for the privilege for the use of the space under the streets.

Id., 335 Pa. At 277-79, 6 A.2d at 886-88.

Under Pennsylvania state law, the Bucks County communities would have the right to require the payment of rent by providers of "information service" who use and occupy the local public rights of way. The requirement for payment of such rent would not be found in a "cable service" franchise. It would be found in a separate ordinance

which does not fall within the purview of Title VI of the federal Communications Act. Further, because highspeed access to the internet is legally characterized as an "information service", not a "telecommunications service", restrictions of Section 253 of the Act applicable to "telecommunications service" would not apply.

The legitimacy and tradition of raising revenue from rental of public ways for the purpose of funding the operations of local government was recognized by a United States Supreme Court case decided in 1892. In the United State's Supreme Court case, St. Louis v. Western Union Telegraph Co.,148 U.S. 92 (1892), the City of St. Louis had passed an ordinance which charged the Western Union Telegraph Co. for use of the city's streets. The court upheld the ordinance and said,

> Clearly, this is no privilege or license tax...It is more in the nature of a charge for the use of property belonging to the city – that which may properly be called **rental**.
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> • • •
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> The revenues of a municipality may come from **rental**s as legitimately and as properly as from taxes.

(emphasis added).

In a modern day context, the United States Supreme Court decided National Cable & Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688

(2005). In that case, the Court looked at the legal characterization of highspeed broadband service (Internet) furnished to subscribers by a cable company. The Court observed that the same infrastructure (wires in the public rights of way) that delivers traditional cable television service also is capable of simultaneously delivering highspeed broadband service to those very same subscribers. The Court ruled that even though the same infrastructure simultaneously delivers the two services, under the '96 Telecom Act, the traditional cable television service fits within the legal definition of "cable service", but the highspeed broadband service fits within a different legal definition called "information service." (The legal definition of "information service" was added into the statute by the '96 Telecom Act.)

The importance of placing highspeed broadband service within the legal definition of "information service" is significant. This is because the Court indicates that highspeed broadband service is legally distinct from telecommunications service, or what in simpler times was called "telephone" service.

This is particularly important to Pennsylvania municipalities. In Pennsylvania, the right of a provider to use and occupy a local community's public rights of way depends upon the *particular* type of service which the provider is furnishing. This right is set forth in a Pennsylvania state statute, Section 1511(e) of Title 15.

Section 1511(e) of Title 15 says:

> A public utility corporation shall have the right to enter upon and occupy streets, highways, waters and other public ways for one or more of the principal *purposes* specified in *subsection (a)* and ancillary purposes

> reasonably necessary or appropriate for the accomplishment of the principal purpose, including the placement, maintenance and removal of aerial, surface and subsurface public utility facilities thereon or therein.

The *subsection (a)* mentioned in the foregoing quotation, in the context of a communications public utility, says the following:

> (6) The conveyance or transmission of messages or communications by telephone or telegraph for the public.

Thus, a communications provider has the right to occupy public rights of way not for any and all purposes, but only for "the conveyance or transmission of messages or communications by telephone or telegraph ." If a provider is to occupy the public rights of way for a purpose other than "the conveyance or transmission of messages or communications by telephone or telegraph", then that provider must obtain authority to do so from another source. As may be seen from the historical recitation in these Reply Comments, in Pennsylvania, the right to control and manage local public rights of way is found in each community's local government and has been reposed there from the time before the existence of the United States Constitution. Thus, in Pennsylvania the authority to occupy a local community's public ways for purposes other than for "the conveyance or transmission of messages or communications by telephone or telegraph" must come from that community. And, as evidenced in these Reply Comments, the right to control and manage local public rights of way includes both the *physical* management

and the *fiscal* management. The point, here, is that under Pennsylvania law an obligation to pay rent for use of the public rights of way depends not only on the physical occupation of the rights of way, but depends as well on the *particular* purpose for which such right of way is occupied. Where the same infrastructure occupying a public right of way is used to deliver different services, as part of exercising its fiscal management over government operations, a local community has discretion to condition a provider's occupation of its rights of way on the payment of rent for some purposes but not for others.

These conditions on the right of a provider to occupy the public rights of way have historical significance and can be traced back to acts of the Pennsylvania legislature passed over 100 years ago. This historical perspective is critical to a modern day understanding of a local community's right in Pennsylvania to manage its rights of way.

The progenitor of the modern day right to occupy public rights of way presently found in Section 1511(e) (discussed above in these Reply Comments) may be found in the separate acts of the Pennsylvania legislature incorporating individual public utilities. (Prior to the enactment of the 1874 General Corporation Law, the incorporation of each company necessitated a special act of the Pennsylvania legislature. In each of those acts, particular powers and rights were specified for the particular company being incorporated.) For example, the Pennsylvania legislature by an act approved April 5, 1866, incorporating the Eastern Telegraph Company, contained this provision:

> Section 13. That before any of the streets of the city of Philadelphia shall be used under the provisions of this Act, the written consent of the Mayor

> of said city, expressed under his official seal, shall be first had and obtained. (P.L. 1868, Appendix, p. 1194).

Shortly after adoption of Pennsylvania's new Constitution in 1874, the state legislature passed the 1874 General Corporation Law, which allowed for the incorporation of companies without the necessity of the legislature approving a separate and individual law each time a corporation was created. Section 33 of that law became the touchstone of telephone and telegraph companies. (Note that while Section 33 applied specifically to communications enterprises, other sections of the 1874 law addressed the specific authorization and rights of other kinds of utilities. For example, Section 34 addressed the rights of water and manufactured gas companies. Significantly, the rights and privileges accorded to utilities were not universally the same under the 1874 General Corporation Law.) Section 33, applying to incorporation of telegraph companies, was amended two years later, in 1876, to explicitly state:

> That before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city...*any may impose such conditions and regulations as the municipal authorities may deem necessary*....

Then, in 1919, as telephone companies emerged from telegraph companies and became increasingly prevalent, the legislature further amended the 1874 General Corporation Law to specifically recognize telephone companies and to address their rights. There, it was said:

> Section 3. Before erecting or constructing any telephone system or systems...across, along, over or under any of the public roads, streets, lanes, or highways...in any city...*application for permission shall be made to the proper authorities of such city*, who shall thereupon grant permission by ordinance, *imposing such reasonable regulations as may be deemed necessary.*

Later, as Pennsylvania began to consolidate into codes over 100 years of various individual laws, the requirement of receiving permission from local government authorities to occupy public rights of way *and*, the right of local government authorities to impose reasonable rules and regulations on such occupation became an indelible facet of Pennsylvania law.

In the 1938 version of Purdon's Pennsylvania Statutes Annotated, the following provision appeared as Title 15, Section 2292:[1]

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[1] Domestic and foreign corporations performing purely *interstate* public utility service became subject to Pennsylvania's Business Corporation Law of 1933. Foreign public utility corporations performing *intrastate* public utility service were subject to the act of June 8, 1911 (P.L. 710, No. 283.) In 1988, the General Association Act was passed. That law repealed the General Corporation Act of 1874 and all other existing utility corporate statutes, effective October 1, 1989, thus bringing all public utilities within the scope of the 1988 Business Corporation Law. The present provision of that law pertaining to telegraph and telephone companies is quoted earlier in these Reply Comments in the discussion of Section 1511(e) of Title 15.

§2292. Powers of telegraph and telephone companies

> Such corporation shall be authorized... to construct lines of telegraph and telephone, along, under and upon any of the public roads, streets, lanes or highways...*subject to the reasonable regulations of the municipalities through which it passes;*

The theme, here, is that since their inception, the right of a telegraph or telephone company to occupy a local community's public ways depends upon its adherence to reasonable rules and regulations imposed by the municipality. This may aptly be seen from a decision rendered in 1876, wherein it was said:

> We are... of the opinion that a grant to a private corporation to use the streets of this city for any purpose is subject to the implied condition that such corporation shall obey and conform to all lawful and reasonable ordinances which the city has enacted to control, restrict, limit or regulate the use so granted....

City of Philadelphia v. Western Union, 11 Phil 327, 33 L.I. 129, 2 WNC 455 (1876).

Finally, the marriage of corporate law and municipal law concepts may be found in the saga of Title 53, Section 1991.

Section 1991 is found in the first volume of Purdon's consolidated municipal laws of Pennsylvania, under the heading "Part I. GENERAL MUNICIPAL LAW." There, at Chapter 11 may be found numerous Articles pertaining to "Streets and Highways." At Article XI is found Section 1991 "Use of street by public utilities." This Section of the consolidated laws emanates directly from three acts of the Pennsylvania legislature in the early twentieth century: 1911, May 11, P.L. 244, §18. Amended 1913, May 20, P.L. 273, §1; 1915, April 14, P.L. 116, §1; and, is verbatim from the last mentioned 1915 law.

Section 1991 says:

> The proper corporate authorities of such municipality shall have the *right to issue permits determining the manner in which public service corporations* or individuals *shall place, on* or under or over such municipal *streets* or alleys, railway tracks, pipes, conduits, *telegraph lines, or other devices* used in the furtherance of business; *and nothing herein contained should be construed to* in any way affect or *impair the rights, powers, and privileges of the municipality in*, on, under, over, or through *the public streets* or alleys of such municipalities, except as herein provided.

Then, in 1988, Section 1991 was repealed "insofar as it is inconsistent with Section 1511 of Title 15", which is the statutory provision quoted above.

Management of the public rights of way is a quintessential government function. See e.g. United States v State Road Department 255 F. 2d 516 (5th Cir. 1958) ("Here, it must be conceded that the building and maintenance of a system of state roads is essentially a government function.") at 518.

The importance of letting local communities decide for themselves how to physically and fiscally manage their local rights of way is recognized as a national public policy goal, as well, and is manifest in the federal Communications Act of 1934, as amended (the "Act").

Section 253(c) of the Act says:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Further, enactment of Section 621(b) evidenced Congressional recognition of the importance of local control over public rights of way and a realization that the power to control local public rights of way was never one of the enumerated powers delegated to the federal government under the Constitution. An examination of the legislative history of Section 621(b) makes this clear.

Section 621(b) was added to the Act by the Cable Communications Policy Act of 1984, P.L. 98-549. In discussing the proper role of local franchising authorities, the legislative history recognizes:

> Most decisions related to the award of a cable franchise have historically been made at the municipal level. House Report No. 98-934, at 23 (5 U.S. Cong. News '84 Bd. Vol-6, 4660)
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> ...
>
> The Committee has determined a need for national standards which clarify the authority of federal, state and local government to regulate cable through the franchise process. Id.
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> ...
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> It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communities needs and can require cable operators to tailor the cable system to meet those needs id at 24 (5 U.S. Cong. News '84 Bd. Vol-6, 4661)
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> ...
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> ... grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems id at 59 (5 U.S. Cong. News '84 Bd. Vol-6, 4696)

Section 621(b), in effect, is Congressional recognition that under the Tenth Amendment to the United States Constitution, the federal government has no authority to usurp the historical and traditional authority of state and local governments to manage and control their public rights of way.

Putting all of this into focus, in the event a company seeks to deploy highspeed broadband in Pennsylvania, (which we now know, by virtue of the Supreme Court's ruling in Brand X is neither "cable service" nor "telecommunications service", but rather is "information service") it can not avail itself of the special statewide Pennsylvania statutory provision of Section 1511(e) of Title 15.

Further, as may be seen from the teachings of both Pennsylvania and United States Supreme Court decisions, local communities in Pennsylvania have a legislative right and tradition of funding the operations of local government through their receipt of rental payments for use of their public rights of way. It is certainly not the role of the Federal Communications Commission to commandeer a local community's public rights of way to enable a private company to engage in the provision of information service as a moneymaking venture. Not only would such commandeering be bad public policy and unlawful, it would artificially subsidize those companies which voluntarily chose to build their business plan on the use of public rights of way, as opposed to those companies which chose to build their business plan not using public rights of way, such as wireless delivery or satellite delivery,

In addition, it would be exceedingly poor public policy for the Federal Communications Commission to now declare itself to be more sagacious in the art of raising revenues to fund local needs than the Borough councilman, Township

supervisors, and other leaders duly elected by the eligible voters in each of those local communities. Quite bluntly, is it the proper role of the Federal Communications Commission to substitute its judgment for that of locally elected officials? Is it the proper role of the Federal Communications Commission to tell local governments in Pennsylvania that they must reduce their level of essential services or raise taxes to cover a shortfall in revenue because the FCC says they are restricted from receiving rental payments from persons who occupy their public rights of way? The members of the Bucks County Consortium of Communities submit the answer is a resounding "No." to both of these questions. It is wrong for the FCC to intrude into the revenue raising discretion possessed by the local government members of the Bucks County Consortium of Communities.

If the FCC were to preempt, eliminate, modify or restrict local franchising such action would be contrary to the longstanding public policy of the United States which recognizes that states and local governments have the right to physically and fiscally manage their public rights of way. Further, such action would be contrary to law.

It is a fundamental proposition that the authority of administrative agencies is limited by their enabling legislation. For an agency to attempt to go beyond its lawful authority is improper. As the Supreme Count recounted:

> An administrative agency's power to regulate the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the Congressional purpose of protecting the

public, we must take care not to extend the scope of the statute beyond the point where Congress intended it to stop.

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

The basis of authority for the FCC to speak, at all, stems from its enabling legislation -- the Communications Act of 1934, as amended. The Constitutional underpinning for the FCC's enabling legislation is the "Commerce" clause, found at Article I, Section 8 of the Constitution. See 47 USC § 151 ("For the purpose of regulating interstate and foreign commerce...", FCC v. League of Women Voters of California, 468 U.S. 364, 376 (1984). National Broadcasting Co. v. U.S., 319 U.S. 190, 227 (1943). Fisher's Blend Station v. Tax Commission of State of Washington, 297 U.S. 650, 655 (1936). Red Lion Broadcasting Co. v. F.C.C., 381 F.2d 908, 927 (D.C. Cir. 1967), aff'd 395 U.S. 367 (1969). Gagliardo v. U.S., 366 F.2d 720, 723 (9th Cir. 1966). The Commerce Clause says, "The Congress shall have Power... To regulate Commerce with foreign Nations and among several States, and with the Indian Tribes".

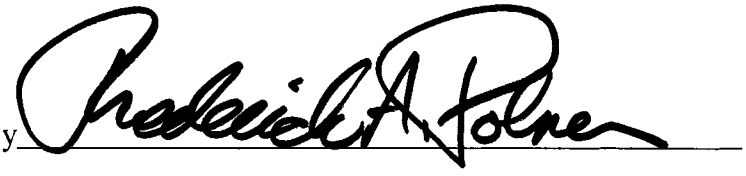
In the captioned matter Section 621(b) and its legislative history poignantly catalog the intent of Congress not to upset the federal-state balance concerning local management and control of rights of way.

In the instant matter, the FCC must be careful not to negate the rights of local governments to manage their public rights of way as is clearly expressed by Congress. The FCC should not now cast aside these historic and important rights, recognized by both Congress and the Supreme Court to be traditional and primary powers reserved to state and local governments.

Finally, the Bucks County Consortium of Communities respectfully submits, in the alternative, that if the Federal Communications Commission were to interfere with the legislative functions of the local government members of the Consortium, doing so would violate the takings clause of the Fifth Amendment to the Constitution, the Tenth Amendment to the Constitution and otherwise would be contrary to law, arbitrary and capricious.

Respectfully Submitted,

BUCKS COUNTY CONSORTIUM OF COMMUNITIES

By 

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Dated: March 28, 2006

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